IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-170

UNITED STATES OF AMERICA

v.

E.M. "MIKE" RIEBOLD
and
DONALD T. MORGAN,

Petitioners

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Tandy L. Hunt and
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The Petitioners, E. M. "Mike" Riebold and Donald T. Morgan pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is attached hereto as Appendix A (hereinafter referred to as "Appendix A). That opinion was entered on May 25, 1977. An order denying

a rehearing (Appendix B) was entered on June 14, 1977. An order denying Defendant/Petitioner E. M. "Mike" Riebold's motion for stay of mandate and granting Defendant/Petitioner Donald T. Morgan's motion for stay of mandate (Appendix C) was entered July 1, 1977. Petitioner E. M. "Mike" Riebold's subsequent motion and suggestions for temporary stay of execution of mandate (Appendix D) was denied by order of July 14, 1977. Although the case is not yet reported, an order was issued by the Court on June 21, 1977, granting the United States Attorney's motion to publish the opinion (Appendix E).

JURISDICTION

The judgment of the Court of Appeals (Appendix A) was entered on May 25, 1977. Defendant's timely motion of petition for rehearing (Appendix B) was denied June 14, 1977. No motion for extension of time for filing a petition for writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Were the Defendants denied effective assistance of counsel and due process of law by the refusal to grant a continuance in a very complicated case concerning 84 counts, which include misapplication of bank funds, fraud, securities violations, which involve funds totaling approximately 5.8 million dollars? Is the Tenth Circuit Court of Appeals incorrect in applying an outdated and unfairly oppressive rule, which differs substantially from other Circuits, concerning effective assistance of Counsel?

Were the Petitioners denied their right to a fair trial, and impartial jury, and due process of law when the Government's chief witness, the FBI agent in charge of the investigation, shortly after initially being sworn to testify on behalf of the Government, stated that his investigation disclosed "kick-backs" from Defendant Riebold to Defendant/Petitioner Morgan in order for Defendant/Petitioner Riebold to secure loans? Did the Court compound the prejudicial nature of the comment by not adequately instructing the jury?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, ..., nor be deprived of life, liberty, or property, without due process of law;..."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to...have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Defendant-Petitioners E. M. "Mike" Riebold and Donald T. Morgan were indicted along with three other Defendants, and charged with violations of 15 U.S.C. 77g (a) (x) - Securities Fraud; 18 U.S.C. 2- Aiding and Abetting; 18 U.S.C.

3-Accessory after the fact; 18 U.S.C. 215 - Receipt of fee for procuring loan; 18 U.S.C. 371- Conspiracy; 18 U.S.C. 656 - Misapplication of bank funds; 18 U.S.C. 1014 - False Statements to Bank to obtain loans; 18 U.S.C. 1341 Mail Fraud; 18 U.S.C. 1343 Wire fraud; 18 U.S.C. 2314 Interstate transportation of property obtained by fraud; 15 U.S.C. 77x false statements in securities registration statement.

After hearings regarding the indictment in CR 74-353, it was agreed that said indictment would be dismissed, and by motion of the government and order of Judge Payne, the indictment in 74-353 was dismissed on May 20, 1975 as to all defendants.

A subsequent indictment, No. CR 75-142, was returned by the Grand Jury and filed in open Court on April 29, 1975. That indictment charged the same offenses against the same defendants and included a total of 84 counts. Trial was set for August 4, 1975.

On June 17, 1975, defendant Harold Morgan pleaded guilty to an information filed by the government in 75-187. On June 20, 1975, defendant Crown pleaded guilty to count 67 of the indictment in 75-142 after withdrawing his former plea of not guilty. On June 23, 1975, defendant Hammon withdrew his former plea of not guilty and pleaded guilty to an information filed by the government in 75-192.

On July 2, 1975, the Federal Public Defender (who had been ordered by the trial court to represent defendant E. M. "Mike" Riebold on June 20, 1975) filed a motion to vacate the August

4, 1975 trial setting. That same day, July 2, 1975, Judge Payne denied that motion for continuance without a hearing. Later on that same day, the trial court revoked the appointment of the Public Defender and indicated that Mr. Riebold had the right to appear pro se and further, that unless he changed his mind, the matter would be heard on August 4. On that same day, Judge Payne wrote a letter to defendant Mike Riebold wherein he indicates that he postponed the case from its original setting of August 4, 1975. There is no further indication why the Court vacated the August 4, 1975 setting, however, by docket entry on July 10, 1975, the case was reset for September 9, 1975.

Prior to the returning of the indictment, defendant Donald T. Morgan had been represented by attorney John C. Maine. On January 9, 1975, (less than three weeks after Donald T. Morgan was indicted) Mr. Maine filed a motion to withdraw, which motion was granted on January 10, 1975. On January 9, 1975, Gene E. Franchini entered his appearance on behalf of Donald T. Morgan. On or about July 11, 1975, Gene Franchini was notified that he would be appointed a district judge. This information was communicated to defendant Donald T. Morgan who immediately began looking for another attorney. Mr. Gene Franchini continued to represent Donald Morgan until he took the oath of office as Judge on August 8, 1975, after which time he was statutorily precluded from acting as attorney for Donald T. Morgan. On August 13, 1975, Donald T. Morgan retained the services of Donald J. Wilson, who entered his appearance on defendant Morgan's behalf that date. On that same day, Mr. Wilson filed a motion for

continuance, stating that Mr. Morgan's previous attorney, Mr. Franchini, had been appointed Judge and that through no fault of defendant Morgan, Mr. Franchini could no longer represent him. In that motion, Mr. Wilson also referred to the anticipated length of the trial, the complexities of the case and the investigation he would need to perform. This request for continuance was similarly denied without a hearing on August 14, 1975. The writer of this brief was employed by Mr. Wilson on August 15, 1975, to assist in the preparation of this case and also to perform an investigation into matters relating to the loans made by Mr. Morgan at the First National Bank. (At that time, the writer was a member of the Louisiana Bar but had not taken the New Mexico Bar exam). On August 21, 1975, during a hearing before the Court, Mr. Wilson again indicated that he had an additional motion for continuance to file. The Court stated that it would be denied even though he had not even read the motion. On September 3, 1975, Mr. Wilson filed a supplemental motion for continuance wherein he reiterated the basis of his original motions, indicated that he had hired the undersigned and specifically stated that he did not have adequate time to prepare for such a monumental trial. On the same day said motion was filed, Mr. Morgan's attorney indicated during a court hearing that he was filing this supplemental motion for continuance. The court similarly denied the motion without even reading it. On that same day, the court signed a motion denying the continuance, indicating erroneously that there had been a hearing on said motion.

The trial itself begain September 8, 1975, and proceeded until November 10, 1975, upon

which day the jury returned its verdict. Defendant Morgan was found guilty of counts 1 through 3, counts 7 through 61, 68 through 79 and 80. Sentencing was set for December 19, 1975, on which date defendant Morgan was sentenced as follows:

> One (1) year each as to counts 1, 2 and 3, sentences to run concurrently; two (2) years as to counts 7 through 61, 68 to and including 79, sentences to run concurrently with all other terms of imprisonment.
>
> It is further ordered, adjudged and decreed that defendant be committed to the custody of the Attorney General or his authorized representative for a period of two (2) years as to count 80, sentence to run consecutively, execution of sentence as to imprisonment in count 80 only suspended, probation five (5) years from this day, upon the special conditions of probation that defendant not associate with any of the other defendants in causes numbered 74-142, 75-187 and 75-192, and that defendant pay the United States a fine in the amount of $10,000.00 as to count 80, as ordered by the probation officer. (P. & Pr. Vol. 1, p. 204).

On the third day of trial, the government introduced its chief prosecution witness, Loyal W. Behrenz, the FBI agent who was in charge of and had conducted the entire investigation herein. When asked what the nature of his investigation was, Agent Behrenz indicated that he was investigating and had found "kick-backs"

made to defendant Morgan in order to obtain loans of the First National Bank through him. This statement was objected to and the jury was excused while the counsel discussed matters with the court. The court excluded the testimony but no instruction was given to the jury when they returned. A motion for mistrial was made and denied.

REASONS FOR GRANTING THE WRIT

Since 1970, various tests have been applied by the Tenth Circuit regarding the effectiveness of legal representation as such representation is affected in whole or in part by a denial of a motion for continuance. In United States v. Davis, 436 F.2d 679 (10th Cir. 1971) the test appeared to be that the services of counsel must be, "of a substandard level such as would make the trial become a mockery and farcical." Affirming an earlier standard enunciated in Gofrith v. United States, 314 F.2d 868 (10th Cir. 19). In United States v. Campbell, 453 F.2d 447 (10th Cir. 1972) the Court alluded to the test that the trial should not be a "sham or a farce.". In United v. Spoonhunter, 476 F.2d 1050 (10th Cir. 1973) regarding the alleged abuse of discretion by the trial judge and refusing a continuance, the test applied was that of a "clear showing of abuse resulting in manifest injustice."

The "mockery of justice" test for effectiveness of counsel has been replaced by the test of "reasonable effective assistance of counsel" in other circuits. Beasley v. United States, 491 F.2d 687 (6th Cir. 1974); West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973); Bruce v. United States, 126 U.S. App. D.C. 336, 379 F.2d 113

(D.C. Cir. 1967). It is relevant to note that the Circuit Court of Appeals for the District of Columbia has rejected the archiac "farce or mockery" test in favor of the "reasonable effective assistance of counsel" test because it was in that circuit that the former test was established. Diggs v. Welch, 80 U.S. App. 5, 148 F.2d 667 (D.C. Cir. 1945), cert denied, 325 U.S. 889 (1945). It appears the Second Circuit has applied the reasonable effective assistance of counsel test in U.S. v. Tarmunti, 513 F.2d 1087 (2nd Cir. 1975) although it is not clear whether that circuit has in fact specifically rejected the farce or mockery test.

We submit that the"reasonably effective assistance of counsel" test would better satisfy the ends of justice.

Lack of adequate time for defense counsel to prepare for trial has been found to constitute a denial of effective assistance of counsel. United States v. Tarmunti, supra; Wolfs v. Britton, 509 F.2d 304 (8th Cir. 1975); United States v. Miller, 508 F.2d 444 (7th Cir. 1974); United States v. Knight, 443 F.2d 174 (6th Cir. 1971); Stokes v. Peyton, 437 F.2d 131 (4th Cir. 1970); United States v. Millican, 414 F.2d 811 (5th Cir. 1969) and numerous other cases.

In the Fourth Circuit there has been created a rebuttable presumption that effective assistance of counsel was not provided if there is an interval of only one day or less between employment of an attorney and the trial. Stokes v. Peyton, supra, and cases cited therein at page 136. This presumption is rebutted if the State shows by "clear proof" that the denial of additional time did not result in prejudice.

> "Adequate preparation for trial often may be a more important element in the effective assistance of counsel to which a defendant is entitled than the forensic skills exhibited in the Courtroom. The careful investigation of a case and the thoughtful analysis of the information it yields may disclose evidence of which even the defendant is unaware and may suggest issues and tactics at trial which would otherwise not emerge." Wolfs v. Britton, supra, citing Moore v. United States, 432 F.2d 730 at 735 (3rd Cir. 1970).

This is not a case where counsel for the defense requested a continuance at the last minute. Don Wilson requested a continuance on the day he filed his appearance. He was obviously aware of the complex nature of the case as evidenced by the 84 count indictment itself and further in the record by affidavits of other attorneys who were somewhat familar with the case.

The trial court did not even have the courtesy to afford Don Wilson a hearing on either of his motions for continuance to determine whether they were well founded or not.

This is not a case where the first attorney was able to assist subsequently retained counsel. Gene Franchini became a judge on August 8, 1975, and thereafter was statutorily precluded from representing a private client. In addition, through the personal knowledge of the undersigned, Gene Franchini did not assist in the defense in any manner subsequent to employment of the undersigned by Don Wilson on about August 15, 1975.

There were no motions for continuance granted in this case at all. The trial court continued the case from August 4, to September 8, ex propio motu. Although there are no specific reasons other than expediting the trial, it cannot be said in retrospect that Don Wilson's motion for continuance was denied because the court had granted prior motions for continuance.

Myopically forcing the trial to "an expeditious" commencement is not a rational basis for the denial of continuance under the facts of this case, especially considering that the indictment in 75-142 had only been returned on April 29, 1975.

There is no basis in reason and even less basis in justice under law for denying Don Wilson's motion for continuance. Failure to do so was not harmless error and substantially affected the rights of the defendant, Don Morgan.

QUESTION II

Where an appellate court perceives from an examination of the record that inadmissible evidence made such a strong impression upon the minds of the jury that its subsequent withdrawal or the instruction to disregard it probably failed to eradicate the injurious effect of it from the minds of the jury, there the defeated party does not have a fair trial of his case, and a new trial should be granted. Maytag v. Cummins, 260 F.75 82 (8th Cir.). This well-established rule has been applied by the Supreme Court of the United States, Federal Court, in criminal and civil cases and in jury and non-jury cases. United States v. King,

7 How. 833, 12 L.Ed. 934; Pennsylvania Company v. Roy, 102 U.S. 451; Hopt v. Utah, 120 U.S. 430; Sinclair, et al v. United States, 279 U.S. 749; and in Federal Circuit Court of Appeals, Copeland v. United States, 2 F.2d 637; Donald v. United States, 102 F.2d 618 (Appellate, D.C.)

It can reasonably be said that the term "kick-backs" may have improperly influenced a juror without the juror being conscious of its influence. See State v. McBeth, 167 LA 324, 119 So. 65 (1928). The admission of some improper evidence cannot be cured because some evidence by its very nature will leave a lasting impression on the mind of juror or judge. Holt v. United States, 94 F.2d 90 (10th Cir. 1937). United States v. DeDominicis, 332 F.2d 207 (2nd Cir. 1964).

When FBI agent, Loyal Behrenz, told the jury he found "kick-backs" in Don Morgan's loan transactions, he in effect told the jury to convict Don Morgan of the majority of the counts in the 84 count indictment. Such a comment required the granting of a mistrial.

SUMMATION

Certiorari should be granted in order to settle the disparities between the Tenth Circuit and the other Circuit courts. The Tenth Circuit ruled as set forth in the opinion attached hereto, that "representation is competent unless it was perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference or preparation," United States v. Dingle, 546 F.2d 1378 (10th Cir. 1976) at 1384 to 1385, should be disregarded in favor of the "reasonable effective assistance of counsel" test which now prevails in other United States Circuits as indicated supra.

CONCLUSION

For the reason stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

JULY, 1977

I hereby certify that on this _____ day of July, 1977, a copy of the foregoing petition for certiorari was mailed to the Solicitor General, Department of Justice, Washington, D.C. 20530. All parties required to be served have been served.

By _____
Tandy L. Hunt and Peter Everett IV
Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

May 25, 1977

Nos. 76-1170 and 76-1171

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

E. M. "MIKE" RIEBOLD and
DONALD T. MORGAN,

Defendant-Appellants.

Appeal from the United States
District Court for the
District of New Mexico
(D. C. No. CR-75-142)

Submitted: March 15, 1977

Lyman G. Sandy, Assistant United States Attorney (Victor R. Ortega, United States Attorney, on the brief), Albuquerque, New Mexico, for Plaintiff-Appellee.

James Patrick Quinn and Philip F. Cardarella, Kansas City, Missouri, for Defendant-Appellant Riebold.

Peter Everett, IV, of Parker, Francis and Everett, Albuquerque, New Mexico, for Defendant-Appellant Morgan.

Before SETH, BARRETT, Circuit Judges, and KERR, District Judge.*

BARRETT, Circuit Judge

*Of the District of Wyoming, sitting by designation.

E.M. "Mike" Riebold (Riebold) and Donald T. Morgan (Morgan)[1] have been found guilty by a jury of receipt of a fee for procuring a loan, aiding and abetting, misapplication of bank funds, false statement in a securities registration statement, wire fraud, interstate transportation of property obtained by fraud, securities, fraud, conspiracy, and mail fraud.[2] On the verdicts, the trial judge entered judgments convicting appellants and sentencing them, from which they appeal.

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1 Hereinafter collectively referred to as appellants.

2 In violation of 18 U.S.C.A. Sec.215, 18 U.S.C.A. Sec 656, 15 U.S.C.A. Sec. 774, 18 U.S.C.A. Sec. 1343, 15 U.S.C.A. Sec. 77q(a), 18 U.S.C.A. Sec. 2314, 18 U.S.C.A. Sec. 371, 18 U.S.C.A. Sec. 1341, and 18 U.S.C.A. Sec. 2.

Appellants were initially charged on December 20, 1974, by an 84 count indictment. This indictment was superseded by a subsequent 84 count indictment filed on April 29, 1975. After three co-defendants entered guilty pleas, appellants proceeded to trial on the 75 counts of the indictment bearing charges relating to them. Riebold was convicted on 72 counts. Morgan was convicted on 71 counts.

Riebold was engaged in the business of mineral development involving oil, gas, and coal. He was the controlling stockholder of several corporations, including American Fuels, Inc., Garfield Mines, Inc., Agua Pura, and United States Lime. Through numerous bank loans and loans from private investors, as will be developed, infra, Riebold was able to project an image of immense wealth.

Morgan was a vice-president and a chief loan officer of the First National Bank of Albuquerque, New Mexico (First National). Morgan initially approved loans to Riebold because he "had thought for some time that our bank, as the second largest bank in the state, ought to achieve a certain expertise in oil and gas lending that didn't exist in New Mexico banks at that time." Thereafter, he continued to approve loans to Riebold because he felt "trapped" and because he believed that additional loans were necessary if First National was to recover any of the money it had advanced.

The trial consumed more than thirty days. The Government introduced an overwhelming amount of evidence which established the manner in which appellants defrauded First National and a number of private investors. Loans were generally

acquired for Riebold and his companies by misrepresentations made by appellants relating to the value of Riebold's assets and the manner in which the monies were to be expended.

The Government proved that Riebold's companies were, for all practical purposes, dormant; that the companies generated little or no income, had negative net worths, and were unable to pay their obligations on a timely basis; that loans advanced by Morgan and private investors allowed the companies to exist; that loans advanced for specific exploration activities were diverted to pay salaries, telephone bills, costs incurred in operating Riebold's airplane, entertainment expenses, work on Riebold's home, and in payment of existing loans and overdrawn bank accounts.

The Government established that Morgan utilized his position as senior vice-president of First National to: loan Riebold approximately three million dollars ($3,000,000.00) at a time when Morgan's authorized lending limit was $150,000; make loans to Riebold that other bank officers would not have made; loan Riebold monies after being warned not to do so because of Riebold's poor payment history; loan Riebold monies without first obtaining a credit check or securing adequate and proper collateral; conceal loans made to Riebold which he knew would not be approved; assure other officers that the Riebold loans would all be repaid shortly; repay some 2.8 million of Riebold's loans by fraudulently completing a signed blank check of a corporate depositor; continue to make loans to Riebold after being expressly admonished by his superiors not to make

any further loans to him. Morgan made these loans in a relatively unnoticed manner because of the high position of influence and authority he held and further because he was much respected within First National. His co-employees and associates were disinclined to challenge his loans. Riebold rewarded Morgan for his help by bestowing financial favors upon him.

The Government introduced detailed evidence establishing the manner by which appellants were able to defraud a number of private investors out of an amount in excess of $2,000,000.00. This is well summarized in the Government's brief: "Riebold's usual method of doing business with these investors and others was to impress them with his apparent wealth, including his lavish mansion and jet planes, which he used to fly investors to various properties. He boasted of his many companies and properties which he falsely represented to be worth many millions of dollars, and told tales of hugh deals that were always just about to be closed."

Riebold and Morgan testified and they presented evidence supportive of their defense which "was a general denial of any intent by Riebold or Morgan to pay or receive any 'kickbacks', or misapply bank funds, or defaud anyone." Whether appellants intended to defraud or injury First National is, of course, immaterial in an 18 U.S.C.A. Sec. 656 prosecution. In United States v. Tokoph, 514 F.2d 597 (10th Cir. 1975), we said:

> ...This evidence is said to indicate Weil and appellant did not intend to injure or defraud the Bank. Whether or not the loans were repaid or the Bank actually suffered a loss is not material to a Sec. 656 charge. "The

> offense occurred and was complete when the misapplication took place." United States v. Acree, supra.
>
> 514 F.2d, at 604.

On appeal appellants do not directly challenge the sufficiency of the evidence. They contend that the trial court erred in: (1) refusing to grant a continuance; (2) denying their motion for a mistrial during the testimony of the Government's chief witness; (3) allowing the jurors to take notes; (4) permitting their trial on a patently biased indictment; and (5) inadequately instructing the jury.

I.
(a)

Morgan contends that the trial court erred in refusing to grant a continuance in that his motion was not dilatory but was necessary to prepare for "such a complex and lengthy trial" and that with additional time he could have produced evidence which would have materially benefited his defense.

Morgan was originally indicted on December 20, 1974. He had the services of retained counsel at that time and for some time prior thereto in the course of First National's investigation. Morgan then retained other counsel who represented him through out the period that the second indictment was brought (April 29, 1975), during the many hearings on motions that arose thereafter and until August 8, 1975, when his counsel assumed a state district judgeship. This ofcourse, precluded him from further representation of Morgan.

His counsel had informed Morgan about July 8, 1975, almost one month prior to his assumption of the judgeship, that he had been so appointed and would be unable to further represent him. Even so, it was four weeks later when Morgan retained new counsel, who entered his appearance in this case on August 13, 1975. At that time, trial had been scheduled for September 8, 1975. The trial court had granted two continuances at that time.

Following his entry of appearance as Morgan's newly retained counsel, he filed for yet another continuance. He contended, inter alia:

> 5. The undersigned is informed and believes that the trial in this cause will last from two to three months and as a result of the complexities of the case, the number of witnesses and exhibits to be offered by the Government and the Defendant, the undersigned respectfully moves the Court for a continuance in order to properly acquaint himself with the case and prepare a defense for the defendant...
>
> (R., Vol. I, p. 167.)

Morgan argues that the denial of the continuance placed an insurmountable burden upon his newly retained counsel in that it was impossible for him to prepare for the trial to commence September 8, 1975. On this predicate, Morgan alleges that he was effectively denied assistance of counsel and due process of law. We hold that the trial court acted well within

its discretion in denying the continuance.

A trial court's determination to deny a motion for a continuance will not be set aside absent proof of a manifest injustice resulting from its denial. In United States v. Hill, 526 F.2d 1019 (10th Cir. 1975), cert. denied, 425 U.S. 940 (1976), we said:

> Consideration of these contentions is based on the well-established rule that "[t]he trial court is vested with discretion as to granting a continuance. Its exercise will not be disturbed on appeal in the absence of a clear showing of abuse resulting in manifest injustice." United States v. Spoonhunter, 476 F.2d 1050 (10th Cir. 1973). Our review of the record convinces us no absuse of discretion occurred in denying this motion for continuance. One attorney had entered his appearance on November 27, 1973, two other attorneys had entered their appearances on January 24, 1974. Services of a court-appointed investigator were utilized. No showing of inadequate time to investigate and prepare for trial is made. See United States v. Harris, 441 F. 2d 1333 (10th Cir. 1971). The record does not show any injustice resulting from the denial of this continuance request.
>
> 526 F. 2d, at 1021-1022.

We hold that the record evidences that Morgan suffered no manifest injustice by reason of the

denial of his motion for a continuance. Although the trial was lengthy, the case was not complex.

The evidence introduced by the Government centered upon Morgan's scheme and intent to defraud First National and a number of private investors. Morgan was ably represented by his experienced retained counsel who had spent considerable time preparing for the trial, aided by the services of a full-time investigator. Morgan's contention that a continuance may have allowed him to present mitigating evidence is too general to pass judicial muster, particularly in view of the adequate, able defense conducted by his retained counsel. The denial of the motion for continuance did not deny Morgan due process of law.

Morgan's related allegation that the denial of his motion for continuance in turn denied him effective assistance of counsel is equally without merit. We cannot lend even token credibility to Morgan's allegation that during the period December, 1974, to August, 1975, his retained counsel did "...little or no action [was taken] to prepare a defense thus shifting the burden of preparing the entire case for the defense to [newly retained counsel] ...", inasmuch the record is devoid of any evidence, direct or circumstantial, supporting this contention.

The standard for effective assistance of counsel is well established in this circuit. In United States v. Dingle, 546 F.2d 1378 (10th Cir. 1976), we said:

> Dingle contends that he was denied his right to counsel as guaranteed by the Sixth Amendment

because his trial counsel was incompetent. A specific hearing was held by the trial court on this issue following remand.

At the competency hearing, Dingle and his wife testified that Dingle repeatedly requested his trial counsel that he be permitted to take the stand. His trial counsel testified that his trial strategy was to attack the credibility of the government witnesses, [R., Vol. I, Supp., p. 17], and that he did not recommend that Dingle testify nor did he contact a witness, Mrs. Bean, because, in his judgment, she was not helpful to the defense strategy. The trial court found that counsel was competent. This finding must be given added weight in light of the fact that the court had an opportunity to view, hear, and observe the witnesses. United States v. 79.95 Acres of Land, More or Less, In Rogers County, State of Oklahoma, 459 F.2d 185 (10th Cir., 1972).

Dingle would have us adopt a new standard for determining the competency of counsel. He urges that the test for competent counsel should be whether the representation "...[is] reasonably likely to render and rendering reasonably effective assistance." People v. Gonzales, 543 P.2d 72, 74 (Colo. App. 1974).

This court has long held that representation is competent unless it

> "was perfunctory, in bad faith, a sham, a pretense or without adequate opportunity for conference or preparation." Johnson v. United States, supra; Tolhurst v. United States, 453 F.2d 432 (10th Cir. 1971); United States v. Baca, 451 F.2d 1112 (10th Cir. 1971), cert. denied, 405 U.S. 1072, 92 S.Ct. 1524, 31 L.Ed. 2d 806 (1972); Ellis v. State of Oklahoma, 430 F. 2d 1352 (10th Cir. 1970), cert. denied, 401 U.S. 1010, 91 S. Ct. 1260, 28 L.Ed. 2d 546 (1971). The rule is alive and well in this circuit.
>
> 546 F.2d, at 1384-1385.

Applying this standard, we hold that Morgan was not denied effective assistance of counsel. Effective assistance of counsel cannot be equated with victorious or flawless counsel. Brady v. United States, 433 F.2d 924 (10th Cir. 1970). In our view Morgan was represented by able trial counsel. His allegation of ineffective assistance of counsel is frivolous and without merit. Finally, we observe that even had Morgan's then retained counsel undertaken "little or no action" between December, 1974 and August, 1975, thereby rendering his representation a sham, farce, or mockery as now contended, (a) it did not extend to or affect the representation at trial, and (b) Morgan must assume the fault for any failure of his trial counsel to exercise greater diligence inasmuch as counsel was retained in each instance. This is particularly applicable when we consider that Morgan learned that his originally retained counsel was to be appointed to a judgeship almost two months prior to the trial date.

(b)

Riebold contends that the trial court refused to allow his appointed counsel sufficient time to prepare for trial. His counsel was appointed on July 10, 1975. Accordingly, he had more than eight weeks to prepare for trial. Riebold submits no specific proof of prejudice, but rather a "shotgun" general allegation that the case was extremely "complex" and that "It is better for the wheels of justice to grind slowly and finely than for them to grind rapidly but crush the right of the accused in the process."

We hold that Riebold's appointed counsel had adequate time to prepare his defense, thus assuring that the wheels of justice were able to grind rapidly without crushing the rights of the accused. However, even had there been inadequate time for his counsel to prepare, the fault rests squarely with Riebold.

Riebold had the services of retained counsel until April 14, 1975. At that time, his attorneys were allowed to withdraw because of Riebold's failure to cooperate with them in the preparation of his defense. From that date until July 10, 1975, when the trial court appointed counsel for him, Riebold continually reassured the trial court that he would obtain counsel, that he was in the process of "hiring one right now," and that "I have about completed negotiations with my attorney." Where, as here, appellant's dilatory tactics are the sole cause for the delay in obtaining counsel, it cannot be held that the trial court abused its discretion in denying a motion for a continuance. In

United States v. Curry, 512 F.2d 1299 (4th Cir. 1975), cert. denied, 423 U.S. 832 (1975), the Court pertinently observed:

> . . . Curry's counsel argues that he did not have adequate time in which to prepare a defense. The record demonstrates that Curry made no effort to retain trial counsel between August 20, 1973, at which time he retained counsel for purposes of representation at arraignment only, and November 27, 1973, just seven days prior to trial when he employed his present counsel. Had Curry acted with reasonable dispatch in employing counsel for trial, no continuance need have been requested. Where the defendant has unreasonably delayed retention of counsel to represent him and such delay is the sole result of defendant's dilatory tactics it is not an abuse of discretion to deny a request for continuance based upon an allegation that additional time would be "helpful" in preparing a defense. In any event, defense counsel did have seven days for preparation. We find no merit in this assignment of error.
>
> 512 F. 2d, at 1302.

Riebold also contends that he was denied effective assistance of counsel because his appointed counsel had to represent him while suffering severe pain and while under the influence of medicine. Riebold states that his trial attorney, "feeling the effects of the intense pain and the drug taken to

relieve that pain, did not effectively represent him." We hold that this contention is not supported by the record.

Riebold's trial attorney did notify the trial court that he was having back pains and that he was taking medicine for this condition. However, he also informed the court that a continuance was not necessary and that the medicine would not impair his ability to represent Riebold, evidenced by the following colloquy:

> THE COURT: Let me ask you a question: would it help you if the Court would allow you to remain seated while you --
>
> MR. DEATON: No, Your Honor, I don't think that would help, I appreciate that, but I don't think that would help. This is something I haven't had trouble with in approximately five years in any real acute nature. I have had one week in this trial where I wore a brace, and was kind of limping around, but it was sufficiently severe this morning, I did want to bring it to the attention of the Court.
>
> Because if I can't control the symptoms of it, I can't function.
>
> THE COURT: Well, the only thing I know to do is for you to just tell the Court, and we will declare a recess.
>
> MR. DEATON: I will.
>
> MR. HARTZ: May I ask the question, will the pain killer dull your mind?

> MR. DEATON: I am not representing that the amount of codeine that I would be taking will sufficiently impair me to continue.
>
> R., Vol. XXIV, pp. 4079-4080.

Riebold's trial counsel advised the court that he would be able to proceed with the trial and afford Riebold effective legal assistance. The record does not contain any further reference to counsel's physical condition even though the trial lasted at least ten days beyond the colloquy, supra. Under these circumstances, and in view of the very able defense afforded Riebold, we cannot accept Riebold's suggestion, advanced and orally argued by his appellate counsel, that we, in effect, look beyond the record in accepting Riebold's personal "diagnosis" of his trial counsel's physical condition, together with some invidious effect upon his mental capacities resulting from the use of codeine, supra.

Even though appellate counsel do not advocate utilization of this circuit's standard for effective assistance of counsel, supra, the allegation on appeal is, in effect, that the retained counsel for Morgan, prior to trial, and Riebold's appointed trial counsel were so ineffective that they rendered the trial a sham, a mockery and a farce. These allegations are wholly frivolous and without merit. We do not look with favor on these bald, unfounded appellate arguments.

II

Appellants contend that the trial court

erred in refusing to grant a mistrial when FBI Agent Behrenz, a certified public accountant, stated on direct examination that the "first count in the indictment . . . refers to one of the kickbacks to Donald Morgan." Defense counsel objected immediately to the use of the word "kickback", alleging that it was highly prejudicial and that its usage mandated a mistrial. The trial court promptly ordered that the testimony be stricken and that the agent should "start over again" in his testimony.

Count I of the indictment states in part:

> . . . DONALD T. MORGAN . . . for endeavoring to procure and for procuring a loan in the amount of $200,000 . . . did stipulate for, agree to receive and receive for his personal use a fee, commission, and thing of value, to-wit: $10,000.

This count clearly charges a "kickback." "Kickback" is defined in Ballentine's Law Dictionary, p. 700, (3rd Ed. 1969), as including "the payment of money or property to an individual for causing his employer . . . to deal otherwise with, the person making the payment."

In United States v. Engle, 458 F.2d 1017 (8th Cir.1972) the Court upheld the refusal to grant a mistrial when a government agent referred to unreported payment as "kickbacks":

> Apellant next complains because the court denied his motion for a mistrial when a witness for the Government, in response to a question on direct examination, referred to the payments received by appellant as "kickbacks."

> The court, upon motion, ordered the question and answer stricken and admonished the jury to disregard both. However, appellant's motion for a mistrial was denied. We are satisfied the incident did not require a mistrial. Indeed, we suspect the agent's use of the term "kickbacks" was warranted. In any event no prejudice resulted.
>
> 458 F.2d, at 1020.

We hold that the use of the term "kickback" did not warrant the trial court's grant of a mistrial. This is particularly true where, as here, the term had been used a dozen times in the Government's opening statement without objection. Furthermore, testimony of the conversation objected to related simply to Count I. Error, even if present, could rise no higher than harmless error because appellants were sentenced to concurrent sentences on numerous counts. Thus, error relative to one count which is unrelated to other counts, as here, could not effect the sentences. United States v. Gamble, 541 F.2d 873 (10th Cir. 1976); United States v. Smith, 532 F.2d 158 (10th Cir. 1976).

III

Morgan contends that the trial court erred in allowing the jurors to take notes during the trial and that a mistrial should have been granted. The trial court allowed the jurors to take notes after one juror requested permission to do so. The court did so because of the complexity of the case, and then only after a majority of the jurors indicated their desire to

take notes. Although Morgan now contends that the trial court's admonitions to the jury relative to notetaking were inadequate, the failed to offer any suggestions or admonitions on notetaking to the trial court at the time the matter arose.

This Court has not ruled on the propriety of notetaking by jurors. While some circuits have differed on this issue, the recent trend is to allow notetaking under the guidance of the trial court. That trend is well stated in United States v. Braverman, 522 F.2d 218 (7th Cir. 1975), cert. denied, 423 U.S. 985 (1975):

> The decision to allow a jury to take notes as well as the procedure used for such note-taking are also matters within the sound discretion of the district court. United States v. Marquez, 449 F. 2d 89, 93 (2d Cir. 1971), cert. denied, 405 U.S. 963, 92 S.Ct. 1173, 31 L.Ed. 2d 239 (1972); United States v. Pollack, 433 F.2d 967 (5th Cir. 1970). We find no abuse of discretion here. Since the jury here requested that they be permitted to make notes during the playing of the tape, the defendant's reliance on United States v. Standard Oil Co., 316 F.2d 884 (7th Cir. 1963), is inapposite.
>
> 522 F. 2d, at 224.

We believe that the rule applied in Braverman, supra, is the logical approach. The ultimate purpose to be served is that of aid and assistance to the jurors. It is well known that judges and trial attorneys, trained by experience and

practice in the art of noting important, relevant facts freely avail themselves of the opportunity of notetaking. The Braverman rule is analogous to our holding that the trial court may allow the submission of papers, documents, or articles to the jury during the course of its deliberations, whether admitted or not, in order to guide and assist the jury in understanding and resolving factual controversies. United States v. Downen, 496 F.2d 314 (10th Cir. 1974), cert denied, 419 U.S. 897 (1974). In Downen, supra, we stated:

> We have held that it is within the discretion of the Trial Court, absent abuse working to the clear prejudice of the defendant, to permit the display of demonstrative or illustrative exhibits admitted in evidence both in the courtroom during trial and in the jury room during deliberations. Taylor v. Reo Motors, Inc., 275 F.2d 699 (10th Cir. 1960); Ahern v. Webb, 268 F.2d 45 (10th Cir. 1959); Millers' National Insurance Company, Chicago, Illinois v. Wichita Flour Mills Company, 257 F.2d 93 (10th Cir. 1958); Carlson v. United States, 187 F.2d 366 (10th Cir. 1951).
>
> 496 F.2d,at 320.

***

To the same effect, we hold that the submission of papers, documents or articles, whether or not admitted in evidence, to the jury for view during trial or jury deliberations, accompanied by careful cautionary instructions as to their use and limited significance, is within the discretion accorded the Trial

Court in order that it may guide and assist the jury in understanding and judging the factual controversy. Shane v. Warner Mfg. Corp., 229 F.2d 207 (3rd Cir. 1956), dismissed 351 U.S. 959, 76 S. Ct. 860, 100 L. Ed. 1481 (1956); Kuhns v. Brugger, 390 Pa. 331, 135 A.2d 395, 68 A.L.R.2d 761; 5B C.J.S. Appeal and Error Sec. 1782, 89 C.J.S. Trial Sec. 467.

496 F.2d, at 321.

Applying these standards to the circumstances of this case, we hold that the trial court did not abuse its discretion in allowing the jurors to take notes. The trial court properly admonished the jurors as to the manner in which they were to take and use notes:

> THE COURT: All right. We will give each of you a stenographer's notebook, and a pencil, and if any of you have reason to have your pencils sharpened, we have a pencil sharpener in the office and the bailiff can sharpen your pencil for you.
>
> Now, I want to make certain admonitions to you. That is, that whatever you put down is confidential. In other words, you can't go out into the jury room and discuss it with each other until the case is submitted to you. In other words, you are not to discuss this case in the jury room or elsewhere.
>
> If any notes have been taken in the jury room up to now, they are to be kept confidential. In other words -- well, you can see what I am

talking about.

Another thing, I don't want note-taking to distract you from hearing the evidence. If you would make your notes at some lull in the proceedings, or when you retire to the jury room, or something, it would be better than to have you distracted.

Of course, if there's some date or something you have to put down while the case is going on, why, that's all right. But I just didn't want this note-taking to distract any of you from hearing the evidence.

Do you all have a notebook now and a pencil?

(R., Vol. IX, pp. 1287-1288.)

IV

Morgan contends that the 84 count indictment returned was patently biased and embarrassing to all defendants. He contends further that it caused great confusion in the minds of the jury, led the jury to infer guilt, and constituted a misjoinder of crimes and defendants. Morgan's "broadside" challenge is that it "does not require one trained in the law to conclude that the 84 count indictment . . . is patently unfair, prejudicial and a constitutional travesty to defendant's rights . . .". He also urges that "legal citations need not be made to support the statement that such an indictment as is found herein must be shown to have embarrassed and prejudiced the defendants in their defense...".

Morgan's attach seems to contend that the trial court erred in refusing to sever the counts and the defendants for trial. We hold that the trial court did not err. The granting of a motion to sever is a discretionary matter which will not be set aside, absent an abuse of discretion. Mutual participation of defendants in an offense or series of offenses is considered a logical, basic ground for refusing to grant a motion to sever. In United States v. Walton, et al., ___F.2d___(10th Cir. 1977) (Decided March 14, 1977), we said:

> . . . One moved for severance prior to trial. We held that a motion for severance is directed to the sound discretion of the trial court, citing to United States v. Rodgers, 419 F.2d 1315 (10th Cir. 1969). We there held that refusal to grant such a motion is error only when that discretion has been abused. In Davis, as in Rodgers, we noted that Fed. Rules Cr. Proc. 8(b), 18 U.S.C.A. permits the joinder of two or more defendants in the same indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses . . ."
>
> (Slip Opinion, p.6.)

See also: United States v. Branker, 395 F.2d 881 (2nd Cir. 1968), cert. denied, 393 U.S. 1029 (1969), where the court upheld the denial of a motion to sever applicable to two of eight defendants named in eighty (80) substantive counts.

Joinder of defendants and counts in the case at bar was proper. In United States v. Eagleston, 417 F.2d 11 (10th Cir. 1969), we stated:

> Eagleston complains of a misjoinder of offenses under Fed. R. Crim. P. 8(a). Faubian complains of a misjoinder of defendants under Fed. R. Crim. P. 8(b).
>
> This court has held the joinder of offenses proper if they are of the same character. Hoover v. United States, 268 F.2d 787 (10th Cir. 1959); Mills v. Aderhold, 110 F.2d 765 (10th Cir. 1940); Archambault v. United States, 224 F.2d 925 (10th Cir. 1955). Therefore the misjoinder claim of Eagleston is without merit.
>
> Under Fed. R. Crim. P. 8(b) when there is a joinder of defendants and offenses totally unconnected, there is no room for judicial discretion and the court must grant severance. Ingram v. United 272 F.2d 567 (4th Cir. 1959). In this case Eagleston participated in the offenses charged in all three counts, however, it is without question that Faubian participated only in counts two and three. Therefore, there was no misjoinder of offenses regarding Eagleston but there was a misjoinder of defendants in regard to Faubian and the conviction of Faubian must be reversed and remanded to the trial court for further proceedings. The government

> argues that since counts two and three were properly joined to count one under Rule 8(a), the joinder of Faubian was proper. Rule 8(a), however, does not apply in cases where more than one defendant is joined in the same indictment. Such joinder is governed by Rule 8(b). . . .
>
> 417 F. 2d, at 14.

We recognize that whenever defendants are tried jointly on a multicount indictment there is a remote possibility that the jury may infer guilt on all the counts garnered simply from a finding of guilt on one of the counts. This conjectural possibility should not, however, dictate nonuse of multicount indictments under proper circumstances. United States v. Meriwether, 486 F.2d 498 (5th Cir. 1973) cert. denied, 417 U.S. 948 (1974). Where the evidence overlaps and the offenses are similar, such as here, and the operable events occurred within a relatively short span of time, joinder of offenses is proper. United States v. Riley, 530 F. 2d 767 (8th Cir. 1976); Fed. Rules Cr.P. Rules 8a, 14, 18 U.S.C.A.

Morgan complains that Count 70, which is a lengthy, detailed conspiracy charge, should not have been included within the indictment. His complaint is without merit. A conspiracy count may be charged in an indictment together with separate counts charging substantive offenses. In United States v. Cooper, 464 F.2d 648 (10th Cir. 1972), cert. denied, 409 U.S. 1107 (1973), we said:

. . . The first improper joinder asserted is that of including the conspiracy charge and the separate substantive offenses together in the indictment. It is a general rule that "a conspiracy count may properly be joined with substantive counts where it is alleged and shown that the offenses are of the same or similar character and are based upon two or more acts or transactions connected together or constituting parts of a common scheme or plan." Miller v. United States, 410 F.2d 1290 (8th Cir. 1969), cert denied, 396 U.S. 830, 90 S. Ct. 81, 24 L. Ed. 2d 80. Inclusion in the indictment of the conspiracy count and the separate substantive counts was not improper under F.R.Crim.P. Rule 8(a).

464 F.2d, at 654.

V

Morgan contends that the trial court erred in instructing the jury that the bank's "full knowledge and consent" of the loans he made would be a defense available to him. Morgan did not object to the instruction given at trial. On appeal, however, he argues that the trial court should have instructed that a defense was available to him if the bank had "knowledge or consent" of the loans. Morgan's contentions are both untimely and without merit. In United States v. MacClain, 501 F.2d 1006 (10th Cir. 1974). we observed:

> The trial court also erred, it is asserted, by giving certain instructions which had a prejudicial effect and by

failing to give a specific instruction on 18 U.S.C. Sec. 2. Our search of the record does not disclose that MacClain either requested a specific instruction regarding Sec. 2 or that he objected to the instructions that were given. He therefore is barred from raising any such arguments under Rule 30,F.R. Crim.P. That rules states, in part:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. See also, United States v. Wheeler, 444 F.2d 385 (10th Cir. 1971); Lucero v. United States, 311 F.2d 457 (10th Cir. 1962), cert denied, 372 U.S. 936, 83 S.Ct. 883, 9 L.Ed. 2d 767.

501 F.2d, at 1012.

See also: United States v. Day, 533 F.2d 524 (10th Cir. 1976); United States v. Ray, 488 F.2d 15 (10th Cir. 1973).

Riebold contends that the trial court erred in giving an instruction on conspiracy. The record reflects that the trial court not only gave the standard conspiracy instruction but that it was, in fact, the very instruction requested by Riebold. Under these circumstances, even had the instruction been erroneous, which is not the case, Riebold could not now

raise the challenge. A defendant cannot complain of error which he invited upon himself. Hanks v. United States, 388 F.2d 171 (10th Cir. 1968); O'Neal v. United States, 240 F.2d 700 (10th Cir. 1957); Head v. United States, 199 F.2d 337 (10th Cir. 1952), cert. denied, 345 U.S. 910 (1953).

VI

We have carefully considered the remaining allegations of error raised by appellants. We hold that they are individually and collectively without merit.

WE AFFIRM.

APPENDIX B

MAY TERM - JUNE 14, 1977

Before the Honorable Oliver Seth, and the Honorable James E. Barrett, Circuit Judges, and the Honorab l e Ewing T. Kerr,* District Judge

*Sitting by designation

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
vs.	)	No. 76-1170
E. M. "MIKE" RIEBOLD, and DONALD T. MORGAN, Defendants-Appellants.	)	No. 76-1171

This matter comes on for consideration of the petition for rehearing filed by E. M. Riebold, and the motion to join in that petition filed by Donald T. Morgan.

Upon consideration whereof, it is ordered that the motion of Donald T. Morgan to join is granted. It is further ordered that the petition for rehearing is denied.

S/Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

A true copy Teste
Howard K. Phillips
Clerk, U.S. Court of
Appeals, Tenth Circuit
By s/Mary A. Sherman, Deputy Clerk

APPENDIX C

MAY TERM - July 1, 1977

Before the Honorable Oliver Seth,
The Honorable James E. Barrett, Circuit Judges,
The Honorable Ewing T. Kerr, Senior District Judge

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	No. 76-1170
	)	
E. M. "MIKE" RIEBOLD,	)	
	)	
Defendant-Appellant.	)	

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	No. 76-1171
	)	
DONALD T. MORGAN,	)	
	)	
Defendant-Appellant.	)	

This matter comes on for consideration of appellants' motion for stay of mandate pending application for certiorari in the captioned causes. The Court also has for consideration the appellee's response to the petition for stay of mandate.

Upon consideration whereof, it is ordered that the motion for stay of mandate as to

appellant Riebold, No. 76-1170, is denied.

It is further ordered that the motion for stay of mandate as to appellant Morgan, No. 76-1171, is granted. The mandate shall be stayed until July 30, 1977, pending certiorari; and that if on or before that date there is filed with the Clerk of the Court of Appeals for the Tenth Circuit a notice from the Clerk of the Supreme Court of the United States that appellant has timely filed a petition for writ of certiorari, the stay shall continue until final disposition by the Supreme Court.

S/Howard K. Phillips
HOWARD K. PHILLIPS
CLERK

A true copy
Teste
Howard K. Phillips
Clerk, U.S. Court of
Appeals, Tenth Circuit

by S/Linda A. Hall
Deputy Clerk

APPENDIX D

MAY TERM - JULY 14, 1977

Before the Honorable Oliver Seth,
The Honorable James E. Barrett, Circuit Judges,
and The Honorable Ewing T. Kerr, Senior
District Judge

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	No. 76-1170
	)	
E. M. "MIKE" RIEBOLD,	)	
	)	
Defendant-Appellant.	)	
	)	

This matter comes on for consideration of appellant's motion and suggestions for temporary stay of execution of the mandate.

Upon consideration whereof, the motion is denied.

HOWARD K. PHILLIPS, Clerk

By S/Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

A true copy
Teste
Howard K. Phillips
Clerk, U.S. Court of
Appeals, Tenth Circuit

By S/Linda A. Hall
Deputy Clerk

APPENDIX E

MAY TERM - June 21, 1977

Before the Honorable Oliver Seth,
The Honorable James E. Barrett, Circuit Judges,
The Honorable Ewing T. Kerr, Senior District
Judge

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	No. 76-1170
	)	
E. M. "MIKE" RIEBOLD	)	No. 76-1171
and	)	
DONALD T. MORGAN,	)	
	)	
Defendants-Appellants.	)	

This matter comes on for consideration of appellee's motion to publish the opinion of the Court in the captioned cause.

Upon consideration whereof, the motion to publish the opinion filed May 25, 1977, is granted.

S/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk